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ABSTRACT

This document describes the 1987 Wisconsin Act 287 which concern providing family leave and medical leave to employees. The background of the law is described in the first part of the document. The second part of the document describes the family and medical leave act. These topics are covered: (1) basic provisions of family and medical leave, including leave periods for childbirth, adoption, and care of a seriously ill family member with the provision that the employee is not entitled to receive wages while taking family or medical leave; (2) definition of employers and employees covered by the Act; (3) scheduling of leave and notice to employer; (4) substitution of other leave provided by the employer for portions of family or medical leave; (5) certification of a serious health condition; (6) employment upon return from leave which requires the employer to place the employee in the former position or an equivalent position; (7) the requirement to maintain the employee's group health insurance coverage under conditions applicable before the leave began; (8) administrative and judicial remedies which employees may pursue; and (9) provisions for sabbatical leave, posted notice, unemployment compensation, and state employee collective bargaining agreements. (ABL)

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**NEW LAW RELATING TO
FAMILY AND MEDICAL LEAVE
(1987 WISCONSIN ACT 287)**

INFORMATION MEMORANDUM 88-13

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May 18, 1988
Madison, Wisconsin

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May 18, 1988

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Information Memorandum 88-13

NEW LAW RELATING TO FAMILY AND MEDICAL LEAVE
(1987 WISCONSIN ACT 287)

INTRODUCTION

This Information Memorandum describes 1987 Wisconsin Act 287, relating to providing family leave and medical leave to employees in this state. The Act took effect on April 26, 1988.

Copies of Act 287 may be obtained from the Documents Room, Basement Rotunda, State Capitol, Madison, Wisconsin 53702; telephone (608) 266-2400.

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PART I

BACKGROUND

1987 Wisconsin Act 287, relating to family and medical leave for employees in this state, went into effect on April 26, 1988. The Act reflects interest in the issue of family leave and medical leave at the federal level and in other states.

The legislation which became Act 287 (1987 Senate Bill 235) is modeled on a federal bill, H.R. 4300, which was introduced into the U.S. House of Representatives in March 1986. That bill did not reach the floor of the House for debate during the 99th Congress.

The federal bill was reintroduced in the 100th Congress in February 1987, as H.R. 925. An amended version of H.R. 925 has been reported out of the two committees to which it was referred. As amended, H.R. 925 would require employers with 50 or more employees to provide unpaid, job protected family and medical leave. Family leave is limited to 10 weeks over a two-year period; and medical leave is limited to 15 weeks over a two-year period. In three years, employers with 35 or more employees would be covered by the law. Amended H.R. 925 is currently awaiting floor action.

In Wisconsin, a 1987 survey of 2,435 manufacturing companies conducted by the Marine Corporation shows that, of the 651 respondents to the survey, 15.1% offered no family leave. Thirty percent of the respondents reported that they had no uniform leave policy, but that leave is negotiated individually with each employee. Of employers with a leave policy, 42.4% report that they provide six weeks of leave to mothers only. Approximately 4.6% of the respondents provide leave which is not based on the sex of the parent, with 1.4% of these providing a six-week leave, 2.7% offering a 12-week leave and 0.5% providing a six-month leave.

Because it appeared that a large percentage of Wisconsin employers do not have a family and medical leave policy, and because the federal legislation had not passed, 1987 Senate Bill 235 was introduced in the 1987-88 Legislative Session. As initially introduced, the Bill would have applied to employers with 10 or more employees, and would have provided for unpaid family and medical leave of up to 26 weeks over a two-year period.

Senate Bill 235 was amended by both the Senate and Assembly to reduce the number of weeks of leave allowed and to increase the number of employees allowed for employers to be covered by the employer exemption. A conference committee was appointed to work out the differences between the Assembly and Senate versions of the Bill. A conference committee substitute amendment was approved by both the Senate and Assembly and was signed into law by the Governor on April 15, 1988. The provisions of the Act are described in Part II of this Memorandum.

PART II

DESCRIPTION OF 1987 WISCONSIN ACT 287

A. FAMILY AND MEDICAL LEAVE: BASIC PROVISIONS

Act 287 provides that an employee may take not more than six weeks of family leave within a 12-month period for any of the following reasons:

1. The birth of the employee's natural child, if the leave begins within 16 weeks of the child's birth.

2. The placement of a child with the employee for adoption or as a precondition to adoption, but not both, if the leave begins within 16 weeks of the child's placement.

An employee may take not more than two weeks of family leave in a 12-month period to care for the employee's child, spouse or parent, if the child, spouse or parent has a serious health condition.

An employee may take not more than eight weeks of family leave in a 12-month period for any combination of the reasons mentioned above: the birth of a child, the adoption of a child or the care of a seriously ill family member.

Family leave may be scheduled by the employee as a partial absence from employment, as long as it is scheduled so as not to unduly disrupt the employer's operations. As an illustration, this type of leave would allow an employee to take family leave following the birth of a child on a part-time basis over a period exceeding six weeks, as long as the total hours of family leave taken do not exceed the number of hours equal to six weeks of full-time employment.

The Act provides that an employee may take not more than two weeks of medical leave during a 12-month period, if the employee has a serious health condition which makes the employee unable to perform his or her employment duties.

Nothing prohibits an employer from providing employees with more generous family and medical leave rights than those provided in the Act.

An employee is not entitled to receive wages or salary while taking family or medical leave.

B. COVERED EMPLOYERS AND EMPLOYES

Act 287 defines an "employer" required to provide family and medical leave as "a person engaging in any activity, enterprise or business in this state employing at least 50 individuals on a permanent basis." "Employer" includes the state and any state-created bodies. Based on 1986 data from the Department of Industry, Labor and Human Relations (DILHR), 6% of Wisconsin employers and 66% of the workforce are covered by the family and medical leave provisions.

The family and medical leave provisions apply only to an employee who has been employed by the same employer for more than 52 consecutive weeks and who worked for the employer for at least 1,000 hours during the preceding 52-week period.

C. SCHEDULING OF LEAVE AND NOTICE TO EMPLOYER

Under Act 287, if an employee anticipates taking family leave for the birth of the employee's child or the adoption of a child, the employee is required to give the employer advance notice of the expected birth or adoption "in a reasonable and practicable manner."

The employee is required to do all of the following, prior to taking family leave for planned medical treatment of a child, spouse or parent, or medical leave due to the employee's own planned medical treatment:

1. Make a reasonable effort to schedule the medical treatment or supervision so that it does not unduly disrupt the employer's operations, subject to the approval of the health care provider of the child, spouse, parent or employee.

2. Give the employer advance notice of the medical treatment or supervision in a "reasonable and practicable manner."

D. OTHER LEAVE PROVIDED BY EMPLOYER

Act 287 permits the employee to substitute other types of paid or unpaid leave offered by the employer, for portions of family or medical leave.

For example, if an employer offers sick leave as a benefit, the employee may substitute any accrued sick leave for the unpaid medical leave under the Act. Likewise, if an employer offers vacation leave, the employee may substitute this leave for unpaid family or medical leave under the Act.

However, the substitute leave provision does not entitle the employee to "add on" leave, offered by the employer and accrued by the employee, to the leave provided for under the Act, in order to extend the protected family or medical leave period beyond that allowed in the Act. The employer is required only to protect the employee's job for two weeks in the case of medical leave, or six weeks in the case of family leave.

As stated previously, nothing prohibits an employer from providing employees with more generous leave rights than those provided in the Act.

E. CERTIFICATION OF SERIOUS HEALTH CONDITION

Under Act 287, the employer may require the employee to provide certification of the serious health condition of the child, spouse or parent whom the employee is taking family leave to care for, or the serious health condition of the employee, if the employee is taking medical leave. The certification may be issued by the health care provider or Christian Science practitioner of the seriously ill person. The employer may require the certification to state no more than the following:

1. The existence of the condition.
2. The onset date and probable duration of the condition.
3. The medical facts of the condition within the knowledge of the person making the certification.
4. If the employee requests medical leave, the extent to which the employee is unable to perform his or her employment duties due to the condition.

An employer may obtain a second opinion regarding the existence of a serious health condition at the employer's expense.

F. EMPLOYMENT UPON RETURN FROM LEAVE

Act 287 requires the employer to immediately place the employee, upon return from family or medical leave, in the employee's former position, if the position is vacant, or in an equivalent employment position, if the former position is not vacant.

If the employee wishes to return to work before the end of the scheduled leave, the employer is required to place the employee in the vacant position or an equivalent position within a reasonable time, not to exceed the duration of the scheduled leave.

The employer is prohibited from reducing or denying an employee's seniority or benefits which accrued to the employee prior to the leave. However, the employee is not entitled to seniority or benefits to which the employee would not have been entitled had he or she not taken the leave, or to the accrual of any seniority or benefits during a period of leave.

G. CONTINUATION OF HEALTH INSURANCE BENEFITS

Act 287 requires the person's employer to maintain group health insurance coverage under the conditions applicable before the leave began. If the employee continues to make any contributions required for participation in a group health insurance plan, the employer is required to continue contributions on behalf of the employee on leave.

An employer may require the employee to place in escrow the entire premium for eight weeks of the employee's group health insurance coverage, if coverage during leave is required. The Act provides that the employee may pay the insurance premium in equal instalments at regular intervals over at least a 12-month period. The employer must deposit the payments in an interest-bearing account. The Act does not require that a separate account be established for each employee. The employer must return the payments, plus interest, to the employee when the employment is terminated. However, if the employee terminates employment within 30 days after a period of leave, the employer may deduct, from the amount returned to the employee, any premium paid by the employer for the employee's insurance coverage during the leave.

H. REMEDIES

Act 287 provides the employee with both administrative and judicial remedies. The employee is entitled to pursue these remedies if:

1. Any person interferes with, restrains or denies the exercise of any right under the Act.
2. The employee is discharged or discriminated against for doing any of the following:
 - a. Opposing a practice prohibited under the Act.
 - b. Filing a charge or instituting or causing to be instituted any proceeding under or related to the Act.
 - c. Assisting or intending to assist in an investigation or proceeding relating to a right under the Act.

d. Testifying or intending to testify in an investigation or proceeding relating to a right under the Act.

If an employee believes that his or her employer has committed any of these violations, the employee may file a complaint alleging the violation. The complaint is filed with the Personnel Commission, if the complaint is against the state or a state-created body, or with the DILHR, if the complaint is against any other employer.

The Act requires DILHR or the Personnel Commission to investigate the complaint and first attempt to resolve it by "conference, conciliation or persuasion." If this does not resolve the complaint, and DILHR or the Personnel Commission finds probable cause to believe that a violation has occurred, DILHR or the Personnel Commission shall pursue an administrative hearing as provided in ch. 227, Stats.

In the course of the administrative hearing, if two or more health care providers disagree over the medical information provided by the employee, DILHR or the Personnel Commission may appoint another health care provider to examine the seriously ill person or employee and render an opinion as soon as possible and notify the employer and employee of the examination. The employee and employer are each liable for 50% of the cost of the examination and opinion.

Within 30 days of the hearing, DILHR or the Personnel Commission must issue its decision and order. Remedies which may be ordered include requiring the employer to:

1. Provide the requested leave.
2. Reinstate the employee.
3. Provide back pay accrued not more than two years prior to the filing of the complaint.
4. Pay reasonable, actual attorney fees.

After completion of the administrative proceeding, including judicial review of the proceeding, either the employee or DILHR or the Personnel Commission may bring a civil action in court for damages for a violation of the Act. The action must be commenced within the later of the following time periods or be barred:

1. Within 60 days from the completion of an administrative proceeding, including judicial review, concerning the violation.

2. Within 12 months after the violation occurred or the employee, DILHR or the Personnel Commission should reasonably have known that the violation occurred.

I. OTHER PROVISIONS

1. Sabbatical Leave

Under current law, a University of Wisconsin (UW) System faculty member is not eligible for sabbatical leave, if the faculty member has taken any other leave in the previous four years. Act 287 provides that family or medical leave does not affect the eligibility of a UW System faculty member for sabbatical leave.

2. Posted Notice

The Act requires each employer covered by the Act to post a notice, in a form approved by DILHR, setting forth the employee's rights under the Act. The notice must be posted in one or more conspicuous places where employee notices are customarily posted. Employers violating this provision are subject to a \$100 forfeiture for each offense.

In addition, the Act requires any person employing at least 25 individuals to post, in a conspicuous place where employee notices are customarily posted, the employer's policy with respect to family and medical leave.

3. Unemployment Compensation

The Act provides that an employee is ineligible for unemployment compensation benefits while the employee is on family or medical leave, until whichever of the following occurs:

- a. The leave is exhausted under the family leave law.
- b. The employer is required to reinstate the employee upon return from leave.
- c. The employee returns to work.

4. State Employee Collective Bargaining Agreements

Under the Act, the employer is prohibited from bargaining on family and medical leave rights below the minimum afforded by the Act. Nothing prohibits the employer from bargaining on rights to family and medical leave which are more generous to the employee than rights provided under the Act.

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